The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RONALD L. EDENS, JAMES J. HLABAN, LAURA J. KEELY, THOMAS P. KEENAN, SYLVIA B. LITTLE, MARY L. McDANIEL, STEPHEN L. NUNN, WILLIAM G. REEVES, HEATHER A. SOREBO, and SUSAN M. WEYENBERG

Appeal No. 2006-1493
Application No. 10/037,276
Technology Center 3700

Decided: February 28, 2007

Before MURRIEL E. CRAWFORD, ANITA PELLMAN GROSS, and JENNIFER D. BAHR, *Administrative Patent Judges*.

BAHR, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Ronald L. Edens et al. (Appellants) appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 1-18 and 22-35, the only claims pending in the application. We have jurisdiction over this appeal under 35 U.S.C. § 6.

The Invention

Appellants' invention is a labial pad configured for disposition within the vestibule of a female wearer for absorption of body exudates (Specification 1). Claim 1 is representative of the claims on appeal and reads as follows:

> 1. An absorbent article (40) comprising a fluid permeable cover (62), a liquid impermeable baffle (64) and an absorbent (66) situated between the cover and the baffle, the absorbent article having a principal longitudinal axis and a principal transverse axis, and being configured to provide a labial pad for disposition within the vestibule of a female wearer, the absorbent having a maximum longitudinal length of no greater than about 100 mm extending from a first transverse end (76) to a spaced apart second transverse end (78), a body-facing surface of the absorbent having a minimum longitudinal length (L_{min}) that lies generally along said principal longitudinal axis from said first transverse end area to said second transverse end area and is less than said maximum longitudinal

> length, a maximum width of no greater than about 70 mm, a widest portion, a width at the widest portion, a narrowest portion, a width at the narrowest portion which is smaller than said width at the widest portion, a maximum thickness of no greater than about 10 mm, first (70) and second (72) end regions and a central region (74) disposed between the first and second end regions, and first (80) and second (82) spaced apart longitudinal sides, the longitudinal sides together with the transverse ends generally forming the periphery of the absorbent, wherein the widest portion of the absorbent is not situated in the central region, and the article is to be folded parallel to said longitudinal axis prior to disposition within the vestibule of the wearer.

The Evidence

The Examiner relies upon the following as evidence of unpatentability:

McFall	US 6,432,096 B1	Aug. 13, 2002

The Rejections

Appellants seek review of the Examiner's rejections of claims 1, 2, 5-10, 13-17, 27, 28, and 31-35 under 35 U.S.C. § 102(e) as being anticipated by McFall and claims 3, 4, 11, 12, 18, 22-26, 29, and 30 under 35 U.S.C. § 103(a) as being unpatentable over McFall.[1]

[1] The Vukos patent (US 5,484,429) cited on page 3 of the Answer has not been considered because it was not positively included in the statement of the rejection. *See In re Hoch*, 428 F.2d 1341, 1342 n. 3, 166 USPQ 406, 407 n. 3 (CCPA 1970).

The Examiner provides reasoning in support of the rejections in the Answer (mailed October 24, 2005). Appellants present opposing arguments in the Brief (filed July 12, 2004) and Reply Brief (filed November 4, 2004).

OPINION

Both of the Examiner's rejections are grounded in part on the Examiner's determination that McFall's absorbent portion 22 has a maximum longitudinal length extending from a first transverse end to a second transverse end and has a body-facing surface having a minimum longitudinal length that lies generally along said principal longitudinal axis from said first transverse end area to said second transverse end area ***and is less than said maximum longitudinal length***, as required in all of Appellants' independent claims 1, 9, 18, and 27. The dispositive issue in this appeal is whether the Examiner erred in making that determination.

The Examiner's position in making that determination is explained on pages 8 and 9 of the Answer, with reference to the annotated Fig. 1 on page 9 of the Answer. In essence, the Examiner defines a "minimum longitudinal length" along the principal longitudinal axis[2] extending between two arbitrary points on the absorbent portion 22 that are in the area of, but not at, the ends of the absorbent portion. The Examiner contends that the definition

[2] We understand the principal longitudinal axis to be the central axis extending in the longitudinal direction along the absorbent article (*see* Specification 5).

in Appellants' claims of the minimum longitudinal length as lying "from said first transverse end ***area*** to said second transverse end ***area***" (emphasis added), rather than from said first transverse end to said second transverse end, invites a reading of "minimum length" as a distance which is less than the entire extent of the absorbent along the principal longitudinal axis (Answer 9).

Appellants argue that the "minimum longitudinal length" identified by the Examiner in the annotated Fig. 1 on page 9 of the Answer is not the entirety of the length of the absorbent and thus is not properly identified as the minimum length of the absorbent called for in Appellants' claims (Reply Br. 2). Appellants point out the length of the absorbent continues beyond the points identified by the Examiner. *Id.*

We agree with Appellants. The Examiner's position that the two arbitrary points identified in the annotated Fig. 1 define the "minimum longitudinal length" of McFall's absorbent portion 22 is unreasonable on its face, for the reasons set forth by Appellants (Reply Br. 2). The claims define the minimum longitudinal length as lying generally along the principal longitudinal axis from said first transverse end area to said second transverse end area, rather than from said first transverse end to said second transverse end, because the recited transverse ends define the ends of the absorbent at the maximum longitudinal length, not at the minimum longitudinal length. While the claim language is awkward, it does not invite a reading of the language "minimum longitudinal length" along the principal longitudinal axis

as being something less than the length of the entire extent of the absorbent along the principal longitudinal axis. Such a reading would require an unreasonable distortion of the term "length" as that term is ordinarily understood.

McFall's Fig. 1 clearly illustrates the length along the longitudinal centerline L as the maximum longitudinal length of the absorbent. Therefore, the longitudinal length along the principal longitudinal axis (longitudinal centerline L) cannot be "less than said maximum longitudinal length" as called for in Appellants' claims. McFall discloses that the absorbent portion 22 can be formed in any suitable configuration, including, for example, ovoid, elliptical, trapezoidal, rectangular, triangular, diamond-shaped, or any combination thereof (col. 5, ll. 29-33), but none of these shapes would appear to satisfy the claim limitation in question, for the reasons discussed above. Accordingly, we cannot sustain either of the Examiner's rejections.

SUMMARY

The decision of the Examiner to reject claims 1-18 and 22-35 is REVERSED.

REVERSED

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